(10)

No. 92-1941

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,
Petitioner,
v.
JERRY W. CARLTON,
Respondent.

MOTION OF ANTHONY C. MORICI, JR., AS EXECUTOR OF THE ESTATE OF CAROL M. McNAMEE AND EILEEN McNAMEE AND ANTHONY C. MORICI, JR., AS TRUSTEES OF THE CAROL M. McNAMEE TRUST AGREEMENT TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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Anthony C. Morici, Jr., as executor of the Estate of Carol M. McNamee, deceased, and Anthony C. Morici, Jr., and Eileen McNamee, as Trustees of the Carol M. McNamee Trust Agreement dated October 12, 1981 (the "McNamee Trust"), hereby move pursuant to Rule 37.4, Rules of the Supreme Court, for leave to file a Brief Amici Curiae in Support of Respondent in the above-entitled matter. The proposed brief is lodged simultaneously herewith. Although petitioner has consented, respondent has refused amici's request for consent to file their proposed brief.

The amici Estate of McNamee and McNamee Trust are currently suing the Internal Revenue Service in the United States Tax Court in San Francisco to contest a notice of estate tax deficiency in the amount of $1,250,490 issued by the IRS in reliance upon the retroactive application of section 10411 of the Omnibus Budget Reconciliation Act of 1987 ("OBRA"), the constitutionality of which is at issue in this case. *Estate of McNamee v. Commissioner,* No. 8789-91 (T.C., filed May 9, 1991). The principal issue in *Estate of McNamee* is identical to the issue here: whether section 10411 of the Omnibus Budget Reconciliation Act of 1987 can constitutionally be applied to deny the estate tax deduction offered under IRC section 2057 as enacted in the Tax Reform Act of 1986, Publ. L. No. 99-514, section 1172, 100 Stat. 2085, in connection with the sale of stock to an Employee Stock Ownership Plan (ESOP) completed before the amending statute was introduced.

The one important difference between *Carlton* and amici's case — and the one that impels them to offer this brief — is that amici, unlike respondent, engaged in the purchase of stock and its subsequent sale to an ESOP *after* the issuance of IRS Notice 87-13 on January 5, 1987 but *before* the introduction in Congress of amending legislation on February 26, 1987. Unlike respondent, therefore, amici have reason to argue that the constitutionally allowable date of retroactivity is no earlier than the date of introduction of the legislation, not the date of the IRS's press release announcing its interpretation of the 1986 statute. At respondent's invitation the Ninth Circuit limited the principle under which respondent prevailed by stating, in *obiter dictum*, that retroactive application of the statute would have been proper

from and after January 5, 1987, the date upon which IRS Notice 87-13 was issued. That *obiter dictum* follows:

> We do not doubt the power of Congress to apply legislation retroactively to the time such legislation was introduced, or even to the time such legislation was proposed by the executive branch. *See Purvis [v. United States]*, 501 F.2d at 313-14 (retroactive application of "interest equalization tax" on American purchases of foreign securities to the time when first proposed by the President does not violate due process). During this time period, the taxpayer is on notice that a change in law is forthcoming. The government has a strong interest in capturing within its taxing powers transactions deliberately rushed through in anticipation of a pending change of law. Our conclusion would likely be entirely different if Carlton had engaged in his transaction after January 5, 1987. *See Ferman v. United States*, 790 F. Supp. 656 (E.D. La. 1992) (rejecting claim that decedent ownership requirement was unconstitutionally applied to transaction in February 1987).
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> *Carlton v. United States*, 972 F.2d 1051, 1062 (9th Cir. 1992).

That conclusion is potentially fatal to the claim of amici's estate if followed, and it is wrong for the two reasons argued in amici's proposed brief but not by respondent: Notice 87-13 failed by its own terms to give adequate notice of the subsequent retroactive amendment, and in any event a low-level executive pronouncement is ineffective to notify taxpayers of prospective legislative amendments to tax statutes.

Neither of these arguments is made by respondent, who repeats in this Court his invitation that retroactivity be limited to transactions occurring after Notice 87-13.[1] The purpose of amici's proposed brief is to persuade the Court to decline that invitation and to rule instead that the statute cannot be retroactively applied

[1] *See* Appellant's Brief at 39 (Ninth Circuit); Appellant's Reply Brief at 11 (Ninth Circuit); Respondent's Brief in Opposition to Petition for Certiorari at 7 n.5.

to transactions occurring prior to its introduction in Congress. For that reason the arguments offered in the proposed brief of amici are new and not made by the parties.

Amici are therefore vitally interested in the outcome of this case because, depending upon the reach of this Court's decision, it will certainly influence and may govern the outcome of amici's own litigation and will do so before amici's suit can be pursued to judgment.

Because of the difference between respondent's and amici's cases amici are confident that the questions of law they address are not, and will not be, addressed by the parties.

Amici therefore respectfully move that this Court accept and file the proposed brief amici curiae, lodged contemporaneously with this motion.

Dated: December 10, 1993

Respectfully submitted,

By /s/ DAVID W. HETTIG

By /s/ CHARLES C. MARSON

Attorneys for Amici